IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1636 OF 1993

1. G. Ram Construction Company, a partnership firm, registered under the Indian Partnership Act, and having its registered Office at 501, Commerce House, Nagindas Master Road, Bombay - 400 023.

2. Shri Champalal Vardhan, of Bombay Indian inhabitant, residing at A/14, Arvind Kunj, Tardeo, Bombay - 400 034. .. Petitioners

Versus

1. Union of India,

2. The Appellate Authority, for Industrial & Financial Reconstruction, having its office at 11th floor, Jeevan Parekh Building, New Delhi.

3. M. Shankar Narayan, Member of The Appellate Authority for Industrial and financial Reconstruc--tion having their office at Jeevan Prakash Building, 11th floor, New Delhi.

4. Kanta Bhatnagar, Member of The Appellate Authority of Industrial & Financial Reconstruc--tion having their office at Jeevan Prakash Building, 11th floor, New Delhi.

5. M/s. Chowgule & Co. (Hind) P.Ltd., a company incorporated under the provisions of the Companies Act,1956 having its registered office at Malhotra House, Opp.G.P.O.,Walchand Hirachand Marg, Bombay - 400 001.

6. Bank of Baroda, having their Central Office at 3, Walchand Hirachand Marg, Ballard Pier,

Bombay - 400 038.]

7. Bank of Maharashtra, having their office (Industrial Finance Br.) at Apeejay House, 130, Mumbai Samachar Marg, Bombay 400 023.]

8. State of Maharashtra.]

9. B.B. Sawant, Office bearer of the Chowgale & Co. (Hind) Pvt. Ltd. Employees Union having his address at C/o. Messrs. Chowgule & Co. (Hind) Pvt. Limited, Mujewade, Thane.] .. Respondents

Mr. Kapil Moye with Mr. Leena Mirasee i/b M/s. Shah & Sanghvi for the petitioners.

Mr. Y.R. Mishra with Mr. N.D. Sharma for the respondents No.1 and 2.

Mr. Uday Bobade i/b Mr. S.D. Nangre for respondent No.5.

Mr. Amjad Sayyed, AGP, for respondent No.8.

CORAM: R.M. LODHA, &
SMT. NISHITA MHATRE, JJ.

DATED: 10TH JANUARY, 2007

ORAL JUDGMENT : [Per R.M. Lodha, J.]

. M/s. Chowgule & Company (Hind) Private Limited - respondent No.5 are lessees of the land bearing Survey No.109 Hissa No.2, 3, 4, 5, 6, 7, 8 (part); Survey No.110 Hissa No.1, 2, 10 to 15; Survey No.111 Hissa No.1, 2, 5 and 8 to 11; Survey No.112 Hissa No.2, Survey No.104 Hissa No.3 to 18; Survey

No.15 Hissa No.1 and 4 to 9; Survey No.107 Hissa No.3 (part) and Survey No.108 Hissa No.5 (part) [hereinafter to be referred to as "the subject property"). The subject property was mortgaged by the respondent No.5 with Bank of Baroda and the Bank of Maharashtra for raising certain loans in the year 1960. In the month of February, 1986, the 5th respondent made an application to the Collector, Thane, seeking permission to sell the subject property. The Collector, Thane by the communication dated 12th March, 1986, asked the 5th respondent to get no objection certificate from the Bank of Baroda and the Bank of Maharashtra. The said no objection certificate is said to have been given by the said Banks in the month of April, 1986. The petitioners' case is that by an agreement in writing dated 21st July, 1986, the 5th respondent agreed to sell the subject property for the consideration set out in the agreement and the terms and conditions stated therein. The 5th respondent company is said to have applied to The Board For Industrial and Financial Reconstruction (for short "BIFR") in the year 1987 and the said application was registered by the BIFR in the year 1987 itself. The BIFR issued a notice to the respondent No.5 (sick industrial undertaking) as to why it should not be wound up which was carried in the Appeal by the respondent No.5 to The Appellate Authority

For Industrial & Financial Reconstruction (for short "AAIFR"). During the pendency of the Appeal before the AAIFR, the operating agency submitted some scheme. On 13th April, 1993, the AAIFR passed the following order:

> "During the course of arguments, a difficulty arose about the concessions sought from Income Tax and Sales Tax Department. The promoter is prepared to give an undertaking, they will proceed in the matter and get the final approval for the realignment from the Central Office. He prays for three weeks time for the purpose. A letter has been received from the Builder with whom the promoter has entered into an agreement for sale of the land in question, be prayed for two weeks time to remain present before the Authority and to express his view point. The letter has been brought by the promoter. The promoter shall intimate the Builder about the next date of hearing and ask him to remain present with the proposal in the matter.
>
> . To come on Tuesday, the 11th May, 1993."

2. Thereafter, on 11th May, 1993, the following order came to be passed :

> "Mr. S.R. Jariwala, respresentative of the appellant, submits that the Managing Director of the Company Mr. P.D. Chowgule has given an undertaking in writing by way of an affidavit to pay all the tax liability on capital gains,. An application dated 12th April, 1993 has been filed by M/s. G. Ram Construction Com today. The learned counsel for that applicant has submitted that the appellant has entered into an agreement for

> sale of the land with his client and therefore, litigation is going on. It has also been submitted that the land in question should not be sold by auction because in that case, his client may not be in a position to bid. The first charge on the land in question is with the Bank of Baroda and the Bank of Maharashtra. These mortgagees have a right to sell the land with the permission of the Government of Maharashtra. The Government of Maharashtra has granted permission for sale. This being the situation, the litigation of M/s. G. Ram Construction Co. cannot be allowed to come in the way of the finalisation of the scheme for rehabilitation. As such, the operative agency is directed to redraft the scheme in view of the discussions regarding capital gains tax and deleting the demand of concessions from Income Tax and Sales Tax as was submitted by the appellant at the last hearing. The redrafted scheme shall be submitted within one month.
>
> . To come on Monday, the 21st June, 1993."

3. Then, on 21st June, 1993, AAIFR passed the following order:

> ". The Operating Agency has filed the scheme. The promoter has filed an affidavit today in consonance with that part of the scheme mentioned at para 4 of the conclusion at page 16 thereby undertaking the payment of Capital Gains Tax liability due to the sale of a part of the land. This affidavit, i.e., the one dated 17th May, 1993, as modified today, shall form part of the scheme. The scheme is approved as a "draft scheme".
>
> . Brief particulars of this draft scheme shall be published in the newspapers as per rules at the cost of the appellant."

4. Then, by the order dated 14th September, 1993, the draft scheme which was already published as per the order of AAIFR was sanctioned since no objection or suggestion was received from anyone in that regard.

5. The order dated 14th September, 1993, reads thus:

> "The draft scheme was published as per the order of this Authority dated 21st June, 1993. No objection/suggestion has been received in that regard. The scheme is sanctioned with the modification that in the provision for Director, the right of this Authority to nominate a Special Director of its choice, will be inserted and the Bank of Baroda will be the monitoring agency to report regarding the implementation of the scheme every six months, the first report to be submitted in April, 1994."

6. The petitioners challenge the aforesaid orders dated 13th April, 1993, 11th May, 1993, 21st June, 1993 and 14th September, 1993 by means of this Writ Petition.

7. The petitioners did not appear before AAIFR on 14th September, 1993 nor did they file objections or suggestions to the draft scheme. That the draft scheme was published as per the order of AAIFR dated 21st June, 1993 is not in dispute. The grievance of the

petitioners in challenging the aforesaid orders is that these orders are in breach of the interim order passed on the Notice of Motion in Suit for specific performance of the contract dated 21st July, 1986 filed by the petitioners against the respondent No.5. Heavy reliance is placed on the judgment of the Supreme Court in the case of **M/s. East India Commercial Company Limited, Calcutta & Anr. Vs. Collector of Customs, Calcutta, AIR 1962, SC, 1893.**

8. The counsel for the petitioners also referred to the interim order passed by this Court in this Writ Petition and the order of the State Government dated 22nd November, 1995 granting permission for sale of the property by respondent No.5 in favour of the petitioner No.1.

9. The question that falls for consideration before us is: whether the aforenoticed orders of AAIFR require interference at our end.

10. Having considered the matter thoughtfully, we are satisfied that the impugned orders dated 13th April, 1993, 11th May, 1993, 21st June, 1993 and 14th September, 1993 do not call for any interference for the reasons that we indicate immediately hereinafter.

11. By the order dated 21st June, 1993, AAIFR had passed an order that the draft scheme submitted by the operating agency shall be published in the newspapers. Accordingly, the brief particulars of the draft scheme were published in the newspapers. Despite the publication of the brief particulars of the draft scheme in the newspapers, the petitioners did not choose to appear before AAIFR nor submitted any objection or suggestion to the draft Scheme. If the petitioners had any serious objection to the draft scheme submitted by the operating agency they ought to have presented their objections before the AAIFR which they never did. Obviously, in view thereof, AAIFR cannot be faulted in approving the draft scheme by its order dated 14th September, 1993.

12. Moreover, it would be seen that pursuant to the order passed by this Court on 26th October, 1993 in this Writ Petition, the respondent No.5 made the fresh application to respondent No.8 for permission to sell the subject property to the petitioners. Pursuant thereto, on 22nd November, 1995, the State Government passed the following order:

"1) Pursuant to the High Court's order dated 26-10-93 and the application dated 7th December 1993 made by M/s. Chaugule and Company, 40652-70 sq. meters of land be sold to M/s. G. Ram Construction Company at the market rate prevailing on the date 7/12/93.

2) The conditions of escleating 50% of the unearned income to the Govt. is incorporated in the agreement made with M/s. Chaugule and Company. The Company's request to relax the same cannot be conceded against the above background. Similarly, the request of the Banks to deposit the entire amount of sale proceeds of the land with the Bank of Baroda also be conceded as the Govt. has a priority right to 50% of the unearned income under the terms and conditions of the agreement.

3) The price of the land at the market rate prevailing as on the date 7-12-93 be determined by a ready reckoner and the said price be got fixed by the Collector, Thane through the Town Planning and Assessment Dept. The said price shall be finalised with the concurrence of the Finance Dept. It is necessary to make it clear that all the parties have agreed that the minimum limit is Rs.470 lacs. Hence, while determining the final valuation, Rs.470 lacs shall be the minimum limit.

4) The amount of 50% of the unearned income shall be got fixed from the Collector, Thane, whose decision with regard to the unearned income shall be final. As the Govt. has a priority right to 50% of the unearned income under the terms and conditions of the agreement, M/s. G. Ram Construction Company should, within three months after informing M/s. Chaugule Company/The Banks pay the amount of the unearned income to the Collector, Thane and deposit the balance with the Bank of Baroda as the lead bank.

5) The amount remaining in balance after repaying all the debts of the company shall be utilised to revive the Company and to pay the debts due to the workers.

6) The Development Outline of the Thane Municipal Corporation is applicable to the sale of the land and (hence), M/s. G. Ram Construction Company do obtain the necessary sanction of the Competent Authority, Urban Land Ceiling Holdings, Thane."

13. As per the aforesaid order, the Collector, Thane was to fix unearned income and the first petitioner was required to deposit 50% of the unearned income so fixed by the Collector within three months of fixation of such unearned income after informing respondent No.5.

14. The Collector, Thane by the order dated 19th August, 2000 fixed the unearned income at 4.7 crores. The first petitioner was informed about the fixation of the unearned income by the Collector, Thane vide communication dated 19th August, 2000. The said communication reads thus:

" No.Revenue/Section-1/T-1
/LBP/Chougule Co. 19/2000
Office of Collector, Thane
Date : 19/8/2000.

To

M/s. G. Ram Construction Co.
R/O.501, Commercial House,
140, Nagindas Master Road,
Fort, Mumbai - 400 023.

Sub: For depositing the amount for

purchase - sale of land.

Village Majiwade, Tal. Thane
bearing S.No.1-4, 105, 107,
109, 110 & 111.

. Whereas land bearing S.No.104, 105, 107, 109, 110 and 111 at Village Majiwade, Thane, has been acquired by the Government and handed over to M/s. Chougule and Co. (Hind) Pvt. Ltd. and since the said company had asked sale permission, Government by order No.LTH 1890/2154 P.N. 4789/A-4, Dt. 22/11/1995, out of said land permission is granted to M/s. Chougule and Co. (Hind) Pvt. Ltd. to sell 40652.70 sq. mt. land to M/s. G. Ram Construction. Price of the said land is fixed at 4.70 cr. As per terms and conditions in the government order, 50 amount of price is to be deposited with Government as non earning amount and 50% amount is to be deposited with Bank of Baroda, as a lead Bank.

. You are hereby informed that Government's 50% non earning amount of Rs.2.35 cr. should be deposited with Government though Tahsildar, Thane and the balance amount be deposited with the lead Bank, Bank of Baroda. The amount should be deposited within 3 months from receipt of this letter.

Sd/-
For Collector, Thane"

15. Admittedly, the first petitioner has not deposited the sum of Rs.2.35 crores with the Government not only within three months from the communication of the order, but until date. We are not concerned with the reasons justifiable or otherwise for not depositing the said amount by the petitioners. As a matter of

fact, the order dated 22nd November, 1995 passed by the State Government and the communication dated 19th August, 2000 are not under challenge at all. The petitioners cannot be permitted to blow hot and cold at the same time. On the one hand, they wanted the State Government to grant permission to the respondent No.5 for sale of the property to the first petitioner and based on that, the State Government granted the permission to respondent No.5 on 22nd November, 1995, but the petitioners failed to comply with the said order, particularly after the unearned income was fixed by the Collector, Thane and by communication dated 19th August, 2000, the first petitioner was asked to deposit Rs.2.35 crores with the State Government within three months therefrom. This conduct of the petitioners disentitles them from invocation of any extra ordinary jurisdiction in their favour.

16. We asked the counsel for the petitioners to show us the Notice of Motion No.3015 of 1990 which was granted in terms of prayer clause (b) except the bracketed portion by the Motion Judge of this Court on 18th June, 1993. However, the counsel was not able to show us the copy of the Notice of Motion No.3015 of 1990. In the circumstances, we are deprived of perusal of the prayer (b) which was granted by the order dated

18th June, 193. We assume, as was contended by the counsel for the petitioners, that by the order dated 18th June, 1993, the Motion Judge restrained the respondent No.5 (defendant therein) from transferring or disposing of the subject land. The order that has been passed by the AAIFR cannot be said to be in breach of that order. The restraint order dated 18th June, 1993 did not restrain AAIFR in passing any appropriate order in exercise of its powers in relation to sick industrial undertaking (respondent No.5.) and as stated earlier, if the petitioners were seriously concerned about that, they ought to have submitted their objections to the draft scheme placed by the operating agency before AAIFR.

17. We are informed by the counsel for respondent No.5 that AAIFR has disposed of the Appeal wherein the impugned orders came to be passed and the matter has been remanded to BIFR for implementation of the scheme. In view of the interim order passed in this Writ Petition, no progress has taken place in implementation of the scheme by BIFR. In the circumstances, it is always open to the first petitioner to approach BIFR and make appropriate application in the proceedings pending before BIFR. Be that as it may, no case for interference in the orders passed by AAIFR on 13th

April, 1993, 11th May, 1993, 21st June, 193 and 14th September, 1993 is made out.

18. Before we close, we may refer to the order dated 20th October, 1993 passed by the Motion Judge in Suit No.3506 of 1990. The order dated 20th October, 1993 reads thus:

> ". Leave under Rules 147 and 148 of the High Court of Judicature at Bombay (OS) Rules 1980 granted to the Plaintiffs to take out a Notice of Motion in terms of the draft Notice of Motion handed in. Notice of Motion is made returnable on 15th December, 1993.
>
> . Heard learned counsel for parties. Perused motion Affidavit in support.
>
> . Instead of granting ad-interim relief in terms of prayer (a) as prayed for, I direct the Respondents to mention the claim of the Plaintiffs under agreement dated 21st July 1986 and pendency of Suit No.3506 of 1990 in this Court in the terms and conditions for sale of property described in Exhibit 'A' to the Plaint.
>
> . After passing of this order, Plaintiffs, Defendants and Respondents have no objection for hearing this Notice of Motion forthwith and making the motion absolute in terms of order granted by me as above.
>
> . Motion is made absolute accordingly.
>
> . Respondents to act on ordinary copy of this order duly subsenticated by the Associate of this Court."

19. Since the scheme is to be implemented by BIFR, obviously the respondents in the Notice of Motion viz. Bank of Baroda and Bank of Maharashtra shall bring this aspect to the notice of BIFR who is to implement the scheme.

20. Though in the Writ Petition, there is challenge to the communication dated 11th March, 1994, sent by the Under Secretary to Government, Revenue & Forest Department to the respondent No.5, during the course of arguments the counsel for the petitioners submitted that the petitioners are not desirous of pursuing the challenge to the communication dated 11th March, 1994.

21. Writ Petition, accordingly, has no merit and is dismissed with no order as to costs. The interim order stands discharged. Oral prayer for stay is rejected.

Sd/-
[R.M. LODHA, J.]

Sd/-
[SMT. NISHITA MHATRE, J.]